FILED
SEP 28 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1631

STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE SUTHERS, as the Chicago Board of Election Commissioners,

Appellants,

vs.

HARRIET G. PONTIKES,

Appellee.

On Appeal From A Three-Judge District Court Of The Northern District Of Illinois

REPLY BRIEF FOR APPELLANTS

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STATEMENT OF FACTS.

Contrary to the Statement of the Case of plaintiff the issues in this case and *Klaetsch and Lombardo* v. *Stern*, No. 71 C 2415, U.S.D.C. N.D. Ill., are not identical. Though the three plaintiffs attacked the constitutionality of the provisions of the same state statutes, the issues raised by the pleadings are different, and the pleadings in *Pontikes*, the only case here on appeal, are too seriously deficient to support the decision of the district court. Furthermore, the three-judge district court never entered an order consolidating these cases, but only chose to hear argument and render the decisions in the cases at the same time. This attempt by the three-judge court to save time here may well have caused more problems since the court failed to recognize the differences in the two cases. Both of the cases were simply attacks by individuals who wished to act in a fashion which, they believed, the Illinois Election Code prohibited.

ARGUMENT.

INTRODUCTION.

Plaintiff's answer to defendants' brief in essence rests on three basic premises; first, the district court properly took jurisdiction in this case because the federal courts and three-judge district courts have taken jurisdiction of other voting cases; second, that the political party is no longer useful to the American system of government; third, that election by plurality is desirable. These premises are simplistic and ignore the requirements of pleading jurisdiction and a claim upon which relief can be granted and the reservation of power in the states by the Constitution. There are no cases decided by this court over the past decades which warrant the assumption of any of those premises.

I.

THE JURISDICTION OF THE THREE-JUDGE DISTRICT COURT.

Sections I, II and III of appellee's brief address themselves essentially to the question of the jurisdiction of the three-judge district court to hear and decide this case. The plaintiff's position is simply that she wished to vote in the Democratic Party Primary on March 21, 1972, Section 7-43(d) of the Illinois Election Code prohibited her participation in that Primary, this is an election case thus vesting jurisdiction in the district court, therefore, that court properly decided the case. This sophomoric position ignores the legal principles enunciated in the cases cited by appellants in Sections I, II and III of their brief.

Plaintiff's exercise in distinguishing the facts of the cases cited as authority by the defendants does not eliminate their value as guides containing statements of legal principles which stand unchallenged. *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965); and *Poe* v. *Ullman*, 367 U.S. 497, 81 S.Ct. 1752 (1961) are apt examples of a principle being announced in one case and being applied in another. The principle announced in *Poe* v. *Ullman*, supra, that the court would not decide cases not having parties who had some present antagonistic positions so that one party was immediately threatened by the other, found that in *Griswold* v. *Connecticut*, supra, the same question was raised where Griswold faced a deprivation of rights protected by the Federal Constitution. In the case at bar, the plaintiff could have made the requisite affidavit under Ill. Rev. Stats. (1971) Ch. 46, §7-45 which is based on the §7-43(d) requirements and voted and made the constitutional defense if she were prosecuted. If the plaintiff construed §7-43(d) as only limiting participation in the Municipal Primary, no federal constitutional question would arise in a criminal prosecution if the Illinois courts accept her construction. This we submit is the teaching of *Poe* v. *Ullman*, supra, and *Griswold* v. *Connecticut*, supra. Thus the "ripeness" that plaintiff finds so appealing in *Griswold* was available to her in this case, but she instead chose the oblique approach rejected in *Poe* rather than meeting the issue head on.

Lawsuits by three voters from two counties out of 102 counties in Illinois and a number of cities which have chosen to have their elections governed by a Board of Election Commissioners, Ill. Rev. Stats. (1971) Ch. 46,

§§ 6-15 - 6-26, and 5-1, hardly raise any reasonable presumption of the facts necessary to satisfy the requirements of Federal Rules of Civil Procedure 23. Klaetsch, Lombardo and Pontikes are hardly so numerous that joinder was impracticable. Only the rights of the individual litigants could have been determined on the pleadings before the district court.

Plaintiff does not dispute the proposition for which *Pan American Petro Corp.* v. *Superior Court of Delaware,* 366 U.S. 656, 81 S.Ct. 1303 (1967); *Gully* v. *First National Bank in Meridian,* 299 U.S. 109, 57 S.Ct. 96 (1936); and *McNutt* v. *General Motors Acceptance Corporation of Indiana, Inc.,* 298 U.S. 178, 56 S.Ct. 780 (1936) are cited. Apparently plaintiff concedes the necessity for the formal assertion of jurisdiction. Plaintiff's quotation from the *Gully* case, supra, at page 9 of her brief, is one of the tests set out by Mr. Justice Cordozo to determine how and when a case arises under the constitution or laws of the United States. The quotation and the argument of the plaintiff following is unwarranted by the whole of the decision.

Apparently plaintiff sees the United States Constitution as governing in every facet of life in these United States. She ignores, and would also have this Court ignore, the Ninth and Tenth Amendments reserving to the people and to the states powers not granted to the Federal Government or prohibited by the Constitution to the States.

Only some of the voters residing within the geographical jurisdiction of the Board of Election Commissioners of the City of Chicago can claim that their ability to vote in any party primary is affected by §7-43(d). The Demo-

cratic and Republican parties do not slate candidates for municipal offices in Berwyn, Stickney or Lyons. Apparently, plaintiff is not aware of the existence of Ill. Rev. Stat. (1971) Ch. 46, §6-1 et seq. which provides for Board of Election Commissioners. So. the comments of the plaintiff at pages 13-15 of plaintiff's brief are necessarily colored by the *fact* that only a part of Cook County is involved and indeed only a part of the area within the jurisdiction of the Board. The role of the Board of Election Commissioners or the County Clerk will vary from one area under its or his jurisdiction to another depending on whether an established political party participates in the municipal officers primary. It is this fact which must be considered along with other relevant tests in determining whether a matter is a local matter not within the jurisdiction of a three-judge court, rather than merely deciding that election laws are involved in the litigation.

II.

THE DISTRICT COURT SHOULD NOT HAVE DECIDED THE CONSTITUTIONAL ISSUE.

Plaintiff's quotation at page 16 of her brief, from Professor Wright's *Law of Federal Courts* is a summary of practically the whole of part IV of defendant's brief. Without doubt, the plaintiff does not understand the doctrine of abstention. Repugnance to a state constitution is not the question. To determine whether the doctrine of abstention applies, the question is whether a state appellate court will construe the statute in question in a fashion that eliminates the need for consideration of the question of whether the statute is repugnant to the Federal Constitution.

Plaintiff, at pages 17 and 18 of her brief, erroneously suggests that the decision of the Illinois Supreme Court in *Faherty* v. *Board of Election Commissioners of the City of Chicago,* 5 Ill.2d 519, 126 N.E.2d 235, (1955) is an issue in the case at bar. The decision in *Faherty* that participation in a statewide primary precludes change of political party in the municipal officers primary is not the same as the question of whether participation in the city primary precludes change in the statewide primary. The latter is a question of how the state statute is to be construed, and we submit that a construction which permits change in the statewide primary participation should have been adopted by the district court in the light of existing authority that state statutes should be construed so as to be constitutional rather than adopting a construction which results in the state statute being declared unconstitutional.

Notwithstanding our views of the proper role of district courts in construing state statutes, the concurring opinion of Mr. Justice Douglas in *Jackson* v. *Ogilvie,* 401 U.S. 904, 91 S.Ct. 642 (1971) is particularly apposite here. *McNeese* v. *Board of Education for Community Unit School District 187, Cahokia, Ill., et al.,* 373 U.S. 668, 83 S. Ct. 1433 (1963) involved a claim of denial of rights guaranteed by the Fourteenth Amendment. The question raised was whether state administrative remedies must be exhausted before seeking relief in the federal courts. No question of statutory construction was involved. Unlike *McNeese,* supra, statutory construction may eliminate from this case the constitutional question.

In addition, Ill. Rev. Stats. (1971) Ch. 110, §57.1 provides for a declaratory judgment and immediate hearing

of the action. The Illinois Supreme Court has decided that election questions are proper subjects for a declaratory judgment action in *Progressive Party* v. *Flynn*, 400 Ill. 102, 79 N.E.2d 516 (1948). Thus a definitive construction of the statute involved in the case at bar was readily available.

III.

THE DECISION ON THE CONSTITUTIONALITY OF §7-43(d) WAS IN ERROR.

Defendants have never said that "*Faherty*, supra, left open the question of the validity" of anything. It is true that the question of the constitutional validity of §7-43(d) has not been decided heretofore. Defendants have suggested that *Faherty* "leaves open" the construction of §7-43(d) under the circumstances in this case in that §7-43(d) may be construed so as to avoid any constitutional question.

The premise of plaintiff's argument that §7-43(d) is unconstitutional is that the integrity and importance of political parties in the American system of government is dwindling. Plaintiff cites no case law for this proposition, but freely narrates her ideas of political history with few, if any, citations to authority. In addition, plaintiff postulates an absolute right to vote under all circumstances. The issue over which plaintiff and defendant differ is not one, however, of the denial of the right to vote, as plaintiff would have this Court believe. Rather it is whether a state may regulate participation in political party primaries so that a political party will in fact represent some particular political and social views. There is no issue of anyone being excluded from the nomination process or the election of government officials.

Contrary to plaintiff's analysis of *Rosario* v. *Rockefeller*, ... U.S. ....., 93 S.Ct. 1245 (1973), defendants submit that that case is indicative of this Court's continued recognition of the importance of the political party in our system of government and the allowance of some protection of them by the states.

Plaintiff would equate the vote in a political party primary with the vote in the general election. That equation distorts the fact. The political party primary is for the benefit of a particular group of people who join together because they believe that they agree that similar principles of government and society are important, and are seeking to select a candidate to represent their views in the general election. Necessarily the primary is an election for people of like political persuasion. Plaintiff approves the district court's decision in *Bendinger* v. *Ogilvie*, 355 F. Supp. 572 (N.D. Ill. 1971), which upheld the Illinois restriction that to be a candidate in a political party primary a person must not have voted in the opposite party primary in the past two years. Ill. Rev. Stat. (1971) Ch. 46, §8-8. Plaintiff's "open primary" argument in this case would make *Bendinger* meaningless because it would be impossible for a prospective candidate or candidate to identify his constituency. The result would be that a primary would be useless in selecting a candidate representing the views of the party and political parties would have no value since they would not be composed of persons who adhere to a similar political and social ideology.

Plaintiff's treatment of *Lippitt* v. *Cipollone*, 357 F. Supp. 1405 (N.D. Ohio 1971), aff'd. 404 U.S. 1032, 92 S. Ct. 729 (1972) is inaccurate. Actually eight sections of the

Ohio Rev. Code were involved in that case. We point out at page 44 of our brief the similarity of one section of the Ohio Rev. Code to section 7-43(d) which was upheld by this Court.

The figures cited by plaintiff at page 26 of her brief concerning the vote cast in the 1971 and 1972 party primaries are not a part of the record in this case. The raw figures, even if accurate, cannot set out changes, if any, in voting patterns. It is significant that while Daniel Walker was elected Governor of Illinois and allegedly carried the area under the aegis of the defendants by over 250,000 votes, the Democratic Party Candidate for State's Attorney lost. The effect of the decision in the case at bar on those elections can only be learned by an analysis of the primary vote. Untested opinions have little, if any, value.

The court's zeal in finding §7-43(d) unconstitutional is in the face of the fact that the court could have granted plaintiff relief without holding the statute unconstitutional. The court could have interpreted §7-43(d) in the manner heretofore suggested, i.e., finding it did not apply where the vote was in the municipal major party primary prior to the statewide primary. This would have satisfied the presumption of constitutionality which all statutes have, and allowed the equal treatment of Chicago citizens with citizens in towns where municipal elections do not include major party candidates.

The conflict between plaintiff and defendants over the constitutionality of §7-43(d) resolves itself into two basic questions: Will this Court overthrow its demonstrated adherence to the jurisprudence developed over almost 200

years and regarding the issues in this case; Will this Court maintain the limits on the federal government including the federal judiciary in encroaching on the right of the states to regulate their affairs, including elections, as preserved and limited by the United States Constitution?

CONCLUSION.

We have demonstrated in our brief and this reply that there is no sound basis for the decision and judgment of the district court.

We respectfully urge this Court to reverse the decision of the district court.

Respectfully submitted,

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